# In the Supreme Court of the United States

OCTOBER TERM, 1970

---

No. 1213

JOSEPH F. SCHIPANI, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion and order of the district court denying petitioner's motion for reduction of sentence (Pet. App. 6A-19A) are reported at 315 F. Supp. 253. The opinion of the court of appeals (Pet. App. 1A-5A) is not yet officially reported.

Opinions relating to earlier proceedings and appeals are reported as follows: (a) 362 F. 2d 825 (affirming initial conviction), vacated and remanded, 385 U.S. 372; (b) 289 F. Supp. 43 (findings and

order concerning tainted evidence); (c) 44 F.R.D. 461 (denying government motion to withdraw waiver of jury trial); (d) 293 F. Supp. 156 (findings and conclusions on merits of indictment); (e) 414 F. 2d 1262 (affirming conviction after retrial), certiorari denied, 397 U.S. 922.

## JURISDICTION

The judgment of the court of appeals was entered on December 10, 1970 (Pet. App. 1A-5A). The petition for a writ of certiorari was filed on January 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the district court, in formulating petitioner's sentence, erred in considering information derived from an illegal electronic surveillance device tending to confirm prior information that petitioner was "a criminal figure" whose unreported income "was the proceeds of organized crime."

## STATEMENT

On the occasion of his initial conviction on five counts of wilfully attempting to evade federal income taxes, petitioner was sentenced in 1965 by District Judge Rosling to three years imprisonment on each of the five counts in the indictment, and was fined $2,500 on each count, with the terms of imprisonment to be served concurrently. This conviction, at the suggestion of the Solicitor General relating to electronic surveil-

lance, was vacated by this Court, 385 U.S. 372, and, upon remand, petitioner was retried and again convicted, and again sentenced (this time by District Judge Weinstein) to three years imprisonment and a fine of $2,500 on each of the five counts, the terms of imprisonment to be served concurrently (Pet. App. 2A).

The new conviction having been affirmed and certiorari denied, 397 U.S. 922, petitioner moved in the district court for a reduction of sentence on the authority of Rule 35 of the Federal Rules of Criminal Procedure.[1] This motion was denied by the district court. (Pet. App. 19A.) In his opinion denying the motion, District Judge Weinstein considered the following question *sua sponte* (Pet. App. 7A-8A; See Pet. App. 3A):

> * * * in imposing sentence may the court consider facts and inferences drawn from illegally obtained evidence suppressed at trial? For the reasons below, we hold that in some cases, includ-

---

[1] Rule 35.

CORRECTION OR REDUCTION OF SENTENCE

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

ing this one, such evidence may be utilized in sentencing.

* * * *

In deciding upon a sentence the Court considered data introduced at the hearing on the motion to suppress but excluded at the trial. Illegal wiretapping of conversations involving the defendant and his associates established that the defendant was a criminal figure, and that his undeclared income was the proceeds of organized crime. *United States* v. *Schipani*, 289 F. Supp. 43, 46, 47, 48 (E.D. N.Y. 1968).

* * * *

This sentence was the maximum that could be imposed consistent with due process after the second trial. *North Carolina* v. *Pearce*, 395 U.S. 711 (1969). The jail term was far longer than would be expected in a routine tax case. See, e.g., Craig, Sentencing in Federal Tax Fraud Cases, 49 F.R.D. 97 (1970). A primary reason for severity was the court's conclusion that the defendant was a "professional criminal." * * *

The present petition attacks the district court's consideration of the suppressed evidence at sentencing.

In ruling on petitioner's motion to suppress on remand from this Court, Judge Weinstein had found that the government's net worth proof was free of taint (289 F. Supp. at 61). However, the court did suppress evidence that likely sources of petitioner's unreported income included (1) petitioner's interest in the Casa Bianca Restaurant, and (2) petitioner's activities as a go-between in negotiations between labor unions and employers (289 F. Supp. at 60-61,

65). The district court found that these particular 'likely sources' had been known to the government prior to the use of an illegal listening device but that it was not clear beyond a reasonable doubt that the Internal Revenue Service's income tax investigation of these previously known leads was not "freshened up" by references thereto gleaned through the illegal listening device (289 F. Supp. at 61). The new trial was thus conducted without evidence as to those sources of income.

The pertinent aspects of the electronic surveillance, as found by the district court in ruling on the motion to suppress, were as follows. In January 1961, in the course of investigating one Michael Clemente, the F.B.I. had installed a microphone at the Prisco Travel Bureau, a front for Clemente (289 F. Supp. at 47). Thereafter, the F.B.I. monitored nine conversations in which petitioner participated and twenty-seven other conversations in which petitioner was mentioned or discussed (289 F. Supp. at 47). The information thus obtained "confirmed the F.B.I.'s belief that [petitioner] was intimately associated with many of the top figures in the Brooklyn underworld and revealed several of his current illicit activities". The district court found that the F.B.I. had been compiling information on petitioner since 1958 and that an F.B.I. report dated October 10, 1960, had described petitioner as "one of the most influential and powerful figures in the New York underworld" and had referred to petitioner's reputed interest in the Casa Bianca Restaurant. An earlier F.B.I. report had referred to petitioner's reputed control of an associa-

tion of private carting companies (289 F. Supp. at 46-47, 61). In evaluating the information illegally acquired from the Prisco surveillance, the district court found, as noted, that it tainted only the specific evidence about sources of income, but did not taint the tax investigation generally, since *inter alia*, "Most of the information obtained from this source was already known" (289 F. Supp. at 61, 65). The district court characterized the illegally acquired information as "comparatively minor leads" (289 F. Supp. at 65). And, as noted, the court of appeals affirmed these conclusions and this Court denied certiorari.

## ARGUMENT

The validity of petitioner's sentence is not impaired by the fact that the district court considered information acquired in 1961 by illegal means, which corroborated earlier F.B.I. reports attributing to petitioner various sources of legal and illegal income and identifying him as an influential and powerful underworld figure. As noted by the district court, all the government's data relating to the illegal surveillance was "freely revealed" by the government (289 F. Supp. at 45), and the accuracy of the illegally monitored conversations, as well as of the justifiable inferences therefrom, has never been denied by petitioner (Pet. App. 10A).

As noted by the court of appeals (Pet. App. 5A) and by the district court (Pet. App. 11A-12A), there are sound precedents in the decisions of this and other courts for withholding application of the exclusionary rule in cases where the objective of deter-

rence can be served only in a speculative and unverifiable manner. The courts below have correctly concluded that this is such a case. They have also properly observed that this case justifies no suggestion that the illegal search was motivated by any desire to amass evidence of aggravated criminality calling into play statutory provisions for an enhanced sentence, as was the case in *Verdugo* v. *United States*, 402 F. 2d 599 (C.A. 9).

Before the surveillance began the government already possessed substantial background reports of petitioner's status as an important professional criminal,[2] and there is no basis for inferring that such an elaborate electronic surveillance program was established with any purpose of bolstering that information

---

[2] Petitioner's assertion (Pet. 6-7) that in the first trial Judge Rosling accepted the government's proofs that petitioner had "likely sources" of income in the form of the Casa Bianca Restaurant and from go-between services in labor relations, but rejected the government's proof of "illegal activities" as a "likely source" does not wholly explain the context and nature of Judge Rosling's rulings. These rulings were entered in connection with determination of guilt and do not indicate what background report later entered into Judge Rosling's sentence. He ruled that, in the absence of corroborating evidence, the government had not proved "beyond a reasonable doubt" that petitioner had made oral preindictment admissions to government agents that he was engaged in "lucrative illegitimate activities." It is at once obvious that Judge Rosling's ruling was made in the context of trial evidence, which excludes hearsay, however cogent. See Appendix to Petition for a Writ of Certiorari, pp. A20, A56, *Schipani* v. *United States*, No. 504, Oct. Term 1966. Judge Rosling recited quantities of evidence indicating petitioner's interest in the Casa Bianca Restaurant and his go-between services in labor relations (*Ibid.*, A51-A55).

looking toward some future sentence to be imposed on petitioner on some as yet unidentified criminal charge. As noted by the district court (289 F. Supp. at 47), this petitioner was not even the subject of the electronic surveillance which picked up information about him, and it now appears that he would have no standing to object to most of what it revealed, *i.e.*, conversations in which he did not participate. *Alderman* v. *United States*, 394 U.S. 165 (1969).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

JOHNNIE M. WALTERS,
*Assistant Attorney General.*

JOSEPH M. HOWARD,
JOHN P. BURKE,
*Attorneys.*

FEBRUARY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 415091 495